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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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**No. 78-615**

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INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS, AFL-CIO,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

and

THE BOEING COMPANY,

*Respondent/Intervenor.*

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**BRIEF OF THE BOEING COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA**

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**QUESTION PRESENTED**

In *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), the Court, by dictum, created an exception to the general rule that a "successor employer is ordinarily free to set initial terms on which it will hire the employees of

a predecessor . . ." (*Id.* at 294-295). This Court stated the exception as follows:

(T)here will be instances in which it is *perfectly clear that the new employer plans to retain* all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. *Id.* at 294-295. (Emphasis supplied)

The question presented is whether Boeing's stated willingness to hire the incumbent employees conditioned upon the incumbent employees' willingness to accept compensation reduced from the level of the Trans World Airlines—IAM bargaining agreement to the level of the Boeing—IAM bargaining agreement made it "perfectly clear that (Boeing) plans to retain" the predecessor's employees.

### STATEMENT OF CASE

The Boeing Company relies upon the correct statement of undisputed facts set forth in the opinion of the court below. (Appendix for Petitioner at 2a-8a)<sup>1</sup> Boeing does not accept the characterization of those facts by the Petitioner in its "Statement of the Case." (Brief for Petitioner at 3-4)<sup>2</sup>

1. Hereinafter cited as "App. at .....".

2. Hereinafter cited as "Brief at ....."; it has always been the Company's position that, regardless of the fact the Company had no bargaining obligation, its actions did not preclude consultation with the IAM about initial terms and conditions of employment. As the Court below noted, it was Boeing that requested a meeting with the IAM to discuss the Company's bid. Upon being advised that Boeing had bid the lower wages contained in its contract with the IAM, the IAM communicated its position to Boeing that the IAM would insist on perpetuation of the bargaining agreement between IAM and Boeing's predecessor, Trans World Airlines. (App. at 5a)

### REASONS FOR DENYING THE WRIT

1. Rule 19 of the Rules of the Supreme Court of the United States lists matters considered by the Court governing review on certiorari. Petitioner has failed to persuasively suggest that the instant case comes within the considerations noted by the Court in Rule 19 nor has the Petitioner raised any "special or important reasons" which should cause the Court to exercise its discretion in favor of granting the writ.

It is, of course, true that the National Labor Relations Board decision dismissing the complaint was a three-to-two decision. *The Boeing Company v. I.A.M.*, 214 NLRB 541 (1974). (App. at 24a-94a) However, it cannot be seriously suggested that a split decision by the Board "constitutes a special or important reason" to cause certiorari to be granted. It is also true that the Labor Board's General Counsel disagreed with the majority. However, it is axiomatic that the General Counsel always disagrees with the Board majority when the majority dismisses the General Counsel's complaint as occurred in the instant case. Disagreement between the General Counsel, as "prosecutor", and a majority of the Labor Board as the "judge and jury", again does not begin to meet the test of "special and important reasons" necessary to receive favorable consideration on a Petition for Certiorari.

2. The Petitioner suggests that the Board and Circuit Court conclusion is incompatible with the exception to the right of a successor to set initial terms and conditions of employment as set forth in dictum by the Supreme Court in *Burns*. In support of its argument, Petitioner contends that the Board and court's application of the *Burns* exception "virtually eviscerates the exception . . ." (Brief at 13) This argument ignores the line of Board and court cases

that have evolved concurrently with and subsequent to the *Burns* decision. In *Denham Co.*, 218 NLRB 30 (1975), the Board concluded that on the day of takeover by a successor of a predecessor's operation it was "perfectly clear" that the successor planned to retain all of the unit employees previously employed by the predecessor. Indeed the contract between the predecessor and successor employer required the successor to retain the predecessor's employees for at least thirty days. After reassuring each predecessor employee that he would be retained for at least thirty days, the successor announced unilateral pay reductions. In ordering reinstatement of the predecessor's wage and benefit rates, the Board found that the facts fell within the *Burns* exception:

The totality of the circumstances surrounding the transfer of ownership from Swift to Respondent clearly evinces an intent by Respondent to retain all the incumbent employees in the unit. The record is devoid of any evidence indicative of a conditional offer of employment. (218 NLRB at 31)

In *Bachrodt Chevrolet Co.*, 205 NLRB 784 (1973), the Board concluded that the successor's work force was hired prior to the announcement of changes in employment terms, and the changes had not been a part of the initial terms of rehiring. Accordingly, applying the *Burns* exception, the successor was required to make restitution for any benefits lost as a result of the unilateral change.

The recent case of *Starco Farmer's Market*, 237 NLRB No. 52, 98 LRRM 1587 (1978),<sup>3</sup> again demonstrates that the *Burns* exception is alive and well. In *Starco*, an offer

3. The Labor Relations Reference Manual cite has been provided for the Court's convenience where the decision has not yet appeared in the official National Labor Relations Board reports.

of different employment terms was made subsequent to the expression of intent to retain the predecessor's employees. In applying the *Burns* exception, the Board concluded:

(T)here is nothing to indicate that the employees were aware of any proposed changes in employment benefits at the time Respondent expressed its intent to retain them. Accordingly, as Respondent 'failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment' (*Spruce Up, supra*, 209 NLRB at 195), we conclude that this case falls within the *Burns* exception. Consequently, Respondent was obligated to bargain with the Union before making any changes in existing terms and conditions of employment. By unilaterally discontinuing trust fund payments, Respondent failed to honor its bargaining obligation and thereby violated Section 8(a)(5). (98 LRRM at 1588-1589)

Finally, in *Spitzer Akron, Inc. v. NLRB*, 540 F. 2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977), the Sixth Circuit considered the *Burns* exception. Employees were advised by the successor corporation that the successor "wanted every man to stay on the job, and would carry on as usual." (540 F. 2d at 843) Several days later, new terms and conditions of employment were announced. In applying the *Burns* exception and enforcing the Board's order prohibiting the unilateral changes, Chief Judge Phillips, speaking for the Court, said:

(We) believe the facts in the instant case are sufficient, nevertheless, to establish that the employees were misled by 'tacit inference' into believing they would be retained without change in the conditions of em-

ployment. Here, the employees were told the Company would 'carry on as usual'. (540 F. 2d at 846)

It is therefore clear that the Board's *Spruce Up*<sup>4</sup>—*Boeing* line of decisions has not decisively weakened the *Burns* exception. Instead, the exception has accommodated the central thrust of the *Burns* case—bargaining freedom. As Mr. Justice White noted in *Burns*:

(A)llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. (406 U.S. at 287)

3. Petitioner argues, but has failed to demonstrate how the decision of the Court below "goes to the heart of the Section 2(3)"<sup>5</sup>—definition of "employee" and that the decision regarding the definition is contrary to prior decisions of the Supreme Court. It is the Petitioner's position that, by construing the *Burns* decision to deny protection in this instance, the Board majority and Court below repudiated *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941) and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). (Brief at 14) However, Petitioner fails to explain its rationale that there was a repudiation of either *Phelps Dodge* or *Hearst*. The issue before the Court in *Phelps Dodge* was whether an employer could refuse to rehire former employees who had participated in a strike against Phelps that began prior to the effective date of the National Labor Relations Act.<sup>6</sup> Noting that the Act prohibits discrimina-

4. *Spruce Up*, 209 NLRB 194 (1974).

5. Brief at 14.

6. 29 U.S.C. §151 et seq.

tion in hiring for the purpose of discouraging membership in a labor organization, the Court concluded that Phelps' refusal to rehire strikers did violate the Act and that the Board had the authority to remedy such discrimination. (313 U.S. at 187) It is difficult indeed to conceive how *Burns* repudiated *Phelps Dodge*.

*Hearst* involved the issue of whether paper carriers were employees of Hearst and therefore entitled to protection under the Act or whether they were independent contractors and not entitled to the Act's protection. Following an extensive discussion of congressional intent in defining the word "employee", the Court agreed with the Board's position that the paper carriers were employees rather than independent contractors. (322 U.S. at 132) Petitioner is necessarily arguing that by refusing to treat the employees of TWA as employees of Boeing before they went to work for, or indeed even applied for employment with Boeing, *Hearst* has been repudiated. The *Burns* exception is consistent with *Hearst*—under certain circumstances it is appropriate to treat individuals as "employees" of the successor for the purpose of imposing a bargaining obligation before they are actually employed by the successor. However, a statement of willingness to hire incumbents *conditioned upon acceptance by incumbents of different terms of employment*, or an actual offer of employment *conditioned upon the acceptance of different terms of employment* cannot and does not, as the Board and courts have consistently concluded, raise the relationship to one of "employer-employee" and thereby invoke a bargaining obligation upon the employer before he is permitted to effectuate the very conditions he outlined in offering employment.

4. The Petition fails to even suggest that the decision of the District of Columbia Circuit is in conflict with

decisions of other circuits. Indeed, it is *totally consistent* with the decisions of both the Second and Sixth Circuits, the only other circuits that have been presented with the issue. See *Spitzer Akron, Inc. v. NLRB*, *supra*; *Nazareth Regional High v. NLRB*, 549 F. 2d 873 (2d Cir. 1977); *BRAC v. REA Express, Inc.*, 523 F. 2d 164 (2d Cir. 1975); and *NLRB v. Wayne Convalescent Center*, 465 F. 2d 1039 (6th Cir. 1972). In each of the above cases, the courts concluded that in offering employment or stating a willingness to hire employees of his predecessor, but only on the condition that the incumbent employees accept terms and conditions different from those of the predecessor, "the successor has not made it perfectly clear that the new employer plans to retain" the employees of the predecessor. Indeed, the Petitioner recognizes that a willingness to hire predecessor employees at different rates does not make it "perfectly clear" that the successor could expect to retain the predecessor's employees. As stated by the Petitioner:

Boeing had offered preferential employment to incumbent TWA employees on Boeing's unilaterally established inferior wage and benefit terms, which many *predictably* rejected. (Brief at 4) (Emphasis supplied)

Circuit Judge Robinson's conclusion is consistent with the views expressed by the other circuits which have considered the *Burns* exception. As Judge Robinson states:

We are constrained, then, to sustain the Board in its conclusion that a successor employer need consult with an incumbent union with respect to initial employment terms prior to fixing them only when he has not evinced any intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents. We are persuaded, too, that the

Board's construction of *Burns* was applied properly to the situation at bar. From the outset, Boeing's decision to retain TWA employees was inseparable from its decision to cling to a scale of diminished wages and benefits. (App. at 23a)

5. Finally, Petitioner suggests that the grant of certiorari is important to determine whether the *Phelps Dodge—Hearst* rationale survives *Burns*. The *Spruce Up—Spitzer Akron—Nazareth—Boeing* interpretation of the *Burns* exception has not detracted from the *Phelps Dodge—Hearst* approach in any way. In fact, it clearly establishes one additional circumstance in which individuals acquire "employee" status prior to actual hiring, and are thereby entitled to protection under the Act. That protection is acquired when the successor makes known its plan to hire, or actually offers employment to, employees of the incumbent and *subsequently* changes wages or terms and conditions of employment. No further clarification is necessary.

## CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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